

The mere building of a church cannot possibly infer an obligation upon a burgh to endow it; and the court never has hitherto, nor ever will grant their authority for erecting a new church, or establishing a second minister, without before hand seeing a proper fund provided for a stipend.

No 191.

Observed from the Bench; The present action is brought for an augmentation of stipend, which can be tried only before this court; the objection to the jurisdiction therefore must be repelled. When indeed the merits of the cause come to be determined, perhaps the defence, that there are not tithes sufficient for an augmentation, may be sustained; but certainly the court has power to try the question.

THE LORDS repelled the objections offered to the competency of the court.

Act. Geo. Wallace, David Dalrymple, M^cQueen, Ferguson, Lockhart. Alt. Rae, Garden,
Johnston, Montgomery, Advocates.

A. W.

Fol. Dic. v. 3. p. 350. Fac. Col. No 104. p. 244.

1784. July 8. The MINISTER of KIRKDEN *against* The HERITORS.

THE stipend payable to the ministers of the parish of Kirkden was augmented in the year 1716. The present incumbent, however, dissatisfied with that allowance, brought a process of augmentation, which was dismissed, in respect of the rule of court, that no new augmentation should be granted where one had been obtained since the Union.

No 192.
An appeal to the House of Lords, from a judgment of the Court of Session, as Commissioners of Tithes, is competent.

The action was afterwards carried, by appeal, to the House of Lords; when it was objected by the heritors, that because the Court of Session judged in questions of this sort as a Committee of Parliament, and as vested with special powers from the legislature, their decisions were not subject to review. In support of this objection, they

Pleaded; The subject of the jurisdiction granted to the Commissioners of Tithes before the Union, was not a matter of civil right, nor cognisable by the ordinary courts of law. The Judges were composed of a certain number of persons out of the three Estates in Parliament, and their proceedings were declared to have the strength and authority of an act of the legislature; 1617, c. 3.; 1621, c. 5.; 1633, c. 19.; 1661, c. 61.; 1663, c. 28.; 1672, c. 15.; 1685, c. 28.; 1686, c. 22.; 1690, c. 30.; 1693, c. 23. The same authority must undoubtedly belong to the Court of Session, erected by the statute 1707, c. 9. into a perpetual commission of tithes, and empowered 'to cognosce and determine in all matters referred by the former laws to the courts of commission, conform to the rules laid down, and powers granted by the statute 1633, and other acts already mentioned.'

Answered; That the Commissioners of Teinds, before the Union, were not a Committee of Parliament, is apparent from their having continued to act

No 192. after the Parliaments which created them were dissolved; Forbes on Tithes, p. 274, 275. Their determinations indeed were not subject to the review of any other court; a circumstance which did not arise from the nature of their jurisdiction, but from the special clauses occurring in the statutes quoted on the other side. Nor were the parties aggrieved by their proceedings altogether destitute of redress, as would infallibly happen at present, if no appeal lay from the Court of Session, as coming in their place. A power was lodged in the commission of 1633, in those of 1663, 1672, 1686, 1699, and 1693, to rectify ' whatsoever valuations led, or to be led, to the enormous prejudice of titulars, or of the heritors, or to the hurt and detriment of the church, and prejudice of the ministers maintenance and provision.'

After the establishment, however, of the perpetual commission in 1707, though the forms of procedure and rights of the parties remained the same, the other peculiarities of the former courts were completely done away. Not only were the anxious clauses, giving the strength and permanency of an act of Parliament to the sentences pronounced by the old commissions omitted, but it is also expressly declared, that the efficacy of the judgments of the Court of Session, in this branch of their jurisdiction, shall be the same as in other civil causes. The course of the common law then being no longer obstructed, as in the temporary commissions, the superintendence of the House of Lords, as the universal appellate jurisdiction, seems altogether unquestionable. In effect they have frequently exercised in this matter their power of review; 20th March 1710, Durham *contra* the Heritors of Largo; 13th July 1713, Sir Hugh Paterson *contra* the Moderator of the Presbytery of Stirling; 11th June 1714, Lord Blantyre *contra* Currie; 15th June 1714, Scott *contra* the Magistrates of Montrose; March 1735, Earl of Galloway *contra* the Heritors of Whithorn; 26th February 1757, Marquis of Tweeddale *contra* Anstruther; 25th July 1757, Marquis of Tweeddale *contra* Dundas; 15th March 1758, King's Advocate *contra* the Duke of Montrose; 17th February 1766, the Magistrates of Edinburgh *contra* the Ministers. See APPENDIX.

On the merits of the judgment of the Court of Session, the heritors farther *Pleaded*; Without some regulation, limiting within certain bounds the right of applying for an increase of stipend, the authority of the Court of Tithes would be the source of perpetual litigation and disquiet, both to laity and clergy. The determination of the Court, therefore, to refuse a second augmentation since the year 1707, which has been matured into an invariable rule, is in itself most wise and salutary; nor is it altogether unsupported by the statute, the powers of the Court of Session, with regard to tithes, not being more ample than those of the ancient commissions, which had no authority, without a special warrant from the legislature, to review or vary their own decreets.

Answered; It cannot be from any defect in the jurisdiction of the Court of Session as a commission of tithes, that it refuses to increase stipends augmented

since the Union; for the statute, by a reference to such of the former commissions as had a power of reviewing their own decreets, has invested it with the same authority. Nor can it be well supported on any other ground, it being the province of the legislature alone to limit, by a regulation so general and arbitrary, the interposition of courts of law. Indeed the propriety of such a restriction may justly be called in question; for if, by an alteration in the mode of living, or by an enlargement of the fund out of which the stipend is payable, the situation of a parish be greatly altered since the year 1707, why should the incumbent be restrained from obtaining a suitable addition to his income? or where is the justice in determining that a liberal provision, granted on the day the commission 1693 expired, should yet admit of increase, while the most scanty one bestowed by the commission in 1707 must remain unalterable? Nor are precedents wanting to justify a deviation even from this rule, which, it is to be remarked, is neither published in the records, nor in any book of practice.

ORDERED and ADJUDGED, 'That the interlocutors complained of, be reversed, and the cause remitted to the Court of Session to proceed accordingly.'

C.

Fac. Col. (APPENDIX.) No 2. p. 3.

No 192.

DIVISION V.

Inferior-Courts.

SECT. I.

Jurisdiction with regard to Ejection.—Improbation.—Contravention.
Process of Transference.—Clandestine Marriage.

1586. *November.*

HOME against HOME.

IN an action of ejection pursued by George Home, son to the guidman of Manderston, as lawful and undoubted assignee, constituted by one Paxton, for ejecting of him forth of certain lands, it was *answered* by David Home, That

No 193.
An inferior judge cannot judge of an ejection.